No. 83-1426

In the Supreme Court of the United States

OCTOBER TERM, 1983

MCKISSICK PRODUCTS COMPANY, ET AL.,
PETITIONERS

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' pay plan violates the overtime provision of the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, by prescribing a fixed amount of pay for weeks involving varying amounts of overtime.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 719 F.2d 350. The orders entered by the district court (Pet. App. B1-B25) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1983 (Pet. App. C1-C2), and a petition for rehearing was denied on November 30, 1983 (*id.* at C3-C4). The petition for a writ of certiorari was filed on February 28, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner McKissick Products Company is a division of petitioner American Hoist and Derrick Company. At its plant in Tulsa, Oklahoma, McKissick manufactures

equipment such as lifting tackle, wire line and chain accessories designed for use with wire rope. Pet. App. A6-A7.

From November 1974 to December 1981, McKissick compensated its maintenance employees pursuant to standardized, individual employee compensation contracts (Pet. App. A7, B4-B7). Under the contract that went into effect in December 1976,[1] the employees received a guaranteed minimum weekly wage, regardless of the hours actually worked, based on a contractually agreed minimum in excess of 40 hours of work per week (*id.* at A7, B7). Specifically, the contract provided for: (1) a regular rate of pay of $6.34 per hour; (2) one and one-half times the regular rate of pay for all hours worked in excess of 40 hours per week; and (3) minimum guaranteed pay for a workweek of 44 hours (*id.* at A10-A11, B7).

McKissick stipulated that its maintenance employees' duties did not require them to work irregular hours (Pet. App. A4, A14-A15). Except for leave for personal reasons, maintenance employees worked at least 40 hours per week, and their weekly hours fluctuated only in the overtime range (*id.* at A15).

2. The Secretary of Labor brought this action in the United States District Court for the Northern District of Oklahoma under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* (FLSA or the Act), to enjoin McKissick from violating the overtime provision contained in Section 7(a)(1) of the Act, 29 U.S.C. 207(a)(1),[2] and to compel

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[1]Only the contract that began in December 1976 is at issue here (Pet. 7 n.2).

[2]Section 7(a)(1), 29 U.S.C. 207(a)(1), establishes the following basic overtime compensation requirements:

> Except as otherwise provided in this section, no employer shall employ any of his employees * * * for a workweek longer than forty hours unless such employee receives compensation for his

payment of back overtime wages due its maintenance employees (Pet. App. B3, B19-B20). The Secretary maintained that McKissick's practice of paying a fixed weekly salary for workweeks involving varying amounts of overtime failed adequately to compensate employees for overtime hours worked. On motions for summary judgment, the district court held that McKissick's employee compensation contracts violated Section 7(a) of the Act, as interpreted in 29 C.F.R. 778.403,[3] in that they permitted McKissick to pay its employees the same total compensation each week even though they worked varying amounts of overtime (Pet. App. B16-B17). The court further held that the overtime exception set forth in Section 7(f) of the Act, 29

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employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

[3] 29 C.F.R. 778.403 provides:

Constant pay for varying workweeks including overtime is not permitted except as specified in section 7(f).

Section 7(f) is the only provision of the Act which allows an employer to pay the same total compensation each week to an employee who works overtime and whose hours of work vary from week to week. (See in this connection the discussion in §§ 778.207, 778.321-778.329, and 778.308-778.315.) Unless the pay arrangements in a particular situation meet the requirements of section 7(f) as set forth, all the compensation received by the employee under a guaranteed pay plan is included in his regular rate and no part of such guaranteed pay may be credited toward overtime compensation due under the Act. Section 7(f) is an exemption from the overtime provisions of the Act. No employer will be exempt from the duty of computing overtime compensation for an employee under Section 7(a) unless the employee is paid pursuant to a plan which actually meets all the requirements of the exemption. These requirements will be discussed separately in the ensuing sections.

U.S.C. 207(f),[4] did not apply and that, by its failure to plead the other exceptions to the overtime requirement, McKissick had waived them (*id.* at B10-B11, B14-B15). The court permanently enjoined McKissick from violating Section 7 of the Act and ordered payment of back overtime wages due McKissick's maintenance employees (*id.* at B27-B30). The court determined that the proper method to compute the overtime premium pay due was to divide each employee's salary by the number of hours worked to determine the regular rate and then to multiply one and one-half times this regular rate by all hours worked in excess of 40 (*id.* at B22-B23). McKissick's motions for a new trial and to vacate the district court's judgment were denied (*id.* at A6).

The court of appeals affirmed (Pet. App. A1-A22). Applying Section 7 of the Act and 29 C.F.R. 778.403, the court held that McKissick's pay plans neither complied with the FLSA overtime provision nor qualified for the exception provided by Section 7(f) (Pet. App. A10, A14). The court reasoned that since the guarantee in the December 1976 contract was in fact not for hours of *work*, but rather for hours of *pay*, McKissick paid its employees "a fixed predetermined amount for varying hours of work from week to

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[4]Section 7(f), 29 U.S.C. 207(f), provides:

> No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) of this section if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate * * * and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

week which had the practical effect of allowing the employer to pay the same compensation regardless of the number of hours actually worked, up to the guarantee" (*id.* at A11). The court of appeals rejected McKissick's contention that its pay plan was valid under *Walling* v. *A.H. Belo Corp.*, 316 U.S. 624 (1942). As the court noted (Pet. App. A14-A15), the rule stated in *Belo* was codified in Section 7(f) of the Act, which applies only to an employer engaged in a business with unpredictable weekly hours of work (see note 4, *supra*). However, McKissick had stipulated by pretrial order that its business was not of that nature and that the provisions of 29 U.S.C. 207(f) did not apply to it (Pet. App. A15). Finally, the court of appeals rejected (*ibid.*) as untimely raised and in any event inapplicable McKissick's claim for a credit under Section 7(e)(7) and (h) of the Act for the contractual overtime premium.[5]

ARGUMENT

The decision of the court of appeals is correct and consistent with the purposes of the FLSA. Moreover, the court's decision does not conflict with any decision of this Court or of any other court of appeals. Further review therefore is not warranted.

Petitioners erroneously contend (Pet. 16-28) that the court of appeals' refusal to apply the principles established in *Walling* v. *A.H. Belo Corp.*, *supra*, and its progeny conflicts with decisions of this Court. In *Belo*, the Court approved a compensation contract for employees who worked irregular hours (316 U.S. at 627) that provided for a

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[5]Section 7(h), 29 U.S.C. 207(h), authorizes the crediting of payments that meet the conditions of Section 7(e)(7), 29 U.S.C. 207(e)(7), toward overtime compensation otherwise payable. Section 7(e)(7) applies to "extra compensation provided by a premium rate paid * * * for work outside of the hours established * * * as the basic, normal or regular workday * * * or workweek * * *."

basic rate of pay for regular-time hours, one and one-half times the basic rate for overtime hours, and a guaranteed minimum weekly payment regardless of the hours actually worked (*id.* at 628). Based on what it viewed as the Act's "common sense recognition of the special problems confronting employer and employee in businesses where the work hours fluctuate from week to week and from day to day" (*id.* at 635) and the value to employees in such businesses of "the security of a regular weekly income" (*ibid.*), the Court upheld the contract at issue.

In response to the Court's decision, Congress codified the rule of *Belo* in Section 7(f) of the FLSA, 29 U.S.C. 207(f) (quoted in note 4, *supra*). See 95 Cong. Rec. A5476 (1949) (remarks of Rep. Lucas).[6] Petitioners stipulated below, however, that the exception provided in Section 7(f) of the Act is inapplicable to this case because there is no fluctuation in the employees' nonovertime hours. Pet. App. A4. Likewise, petitioners concede in this Court (Pet. 44) that "[t]he existence, or non-existence, of Section 7(f) of the Act is irrelevant to the validity of the compensation agreements between Petitioner and its employees." Accordingly, there is no conflict between the decision below and the principles announced by the Court in *Belo*, as codified in Section 7(f).

While petitioners acknowledge that the exception provided in Section 7(f) of the Act cannot avail them because of the absence of any fluctuation in the nonovertime hours worked by their employees, they contend (Pet. 37-44) that Section 7(f) does not provide the exclusive means whereby an employer may guarantee payment for a minimum

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[6]Section 7(f), 29 U.S.C. 207(f), was originally enacted as Section 7(e) of the Fair Labor Standards Amendments of 1949 (63 Stat. 910, 914). It was redesignated without change in wording by the Fair Labor Standards Amendments of 1966 (Pub. L. No. 89-601, 80 Stat. 830, 836), which became effective February 1, 1967 (*id.* at 844).

number of hours of work. Petitioners thus suggest that, by enactment of Section 7(f), Congress intended only to limit the maximum number of hours that could be guaranteed by a *Belo*-type contract, not to restrict guaranteed pay plans to businesses that require irregular nonovertime hours. There is no support for petitioners' claim. Indeed, the relevant lower court case law is to the contrary. See *Donovan* v. *Brown Equipment & Service Tools, Inc.*, 666 F.2d 148, 154 (5th Cir. 1982); *Marshall* v. *Hamburg Shirt Corp.*, 577 F.2d 444 (8th Cir. 1978); *Hodgson* v. *Price*, 486 F.2d 1406 (7th Cir. 1973) (table) (published at 21 Wage & Hour Cas. 342, 343), cert. denied, 416 U.S. 956 (1974). Nor has this Court ever suggested that the scope of the exception recognized in *Belo* exceeds the scope of the exemption codified in Section 7(f).[7]

Petitioners erroneously rely on the Eighth Circuit's decision in *Tobin* v. *Little Rock Packing Co.*, 202 F.2d 234, cert. denied, 346 U.S. 832 (1953). But in *Little Rock Packing*, the court of appeals upheld a contract as coming within the exception in Section 7(f) of the Act. 202 F.2d at 238 & n. 1. Because petitioners have conceded that Section 7(f) has

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[7]As noted above (page 6, *supra*), the remarks of Representative Lucas, the sponsor of the bill that became Section 7(f) (see 95 Cong. Rec. A5475 (1949)), indicate that the provision was intended to codify the *Belo* decision entirely. This Court has frequently noted the special weight that is due the views of the sponsor of legislation. See *NLRB* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 66 (1964). By contrast, the Court has "often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents" (*ibid.*). The views of Representative Combs, on which petitioners rely (Pet. 40), were stated in the context of his opposition to the House's substitution of the Lucas bill for a bill sponsored by Representative Lesinski, which Representative Combs had supported (95 Cong. Rec. 11221 (1949) (remarks of Rep. Combs)). In any event, nothing in Representative Combs' remarks suggests that *Belo* contracts would be available to employers whose businesses do not require irregular hours of nonovertime work (*ibid.*).

no application to the instant case, there can be no conflict between it and *Little Rock Packing*.[8]

In any event, *Little Rock Packing* is not authority for the proposition that a *Belo* contract is appropriate even though the employer's business does not require irregular nonovertime hours. First, as noted below (note 8, *infra*), the Secretary did not challenge the contract at issue in that case based on the absence of a showing of irregular hours. Rather, the thrust of the Secretary's challenge apparently was that no employee ever worked in excess of the maximum weekly hours guaranteed, so that there was never any occasion to rely on the stipulated hourly rate in determining the overtime compensation actually paid. See petition for a writ of certiorari filed in *Tobin* v. *Little Rock Packing Co.*, (No. 831, 1952 Term); see also *Mitchell* v. *Hartford Steam Boiler Inspection & Insurance Co.*, 235 F.2d 942, 946 (2d Cir.), cert. denied, 352 U.S. 941 (1956) (citing *Little Rock Packing* in support of rejection of Secretary's contention that a *Belo* plan is invalid where employee's actual hours do not exceed number of guaranteed hours in a substantial number of workweeks); *Mitchell* v. *Adams*, 230 F.2d 527, 531 (5th Cir. 1956) (same); *Mitchell* v. *Brandtjen & Kluge, Inc.*, 228 F.2d 291, 298 (1st Cir.), cert. denied, 352 U.S. 940 (1956) (same). Our research has disclosed no appellate court decision that has cited *Little Rock Packing* for the proposition that a *Belo* contract is appropriate where the employee's hours fluctuate only in the overtime range. This is strong

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[8]Petitioners argue (Pet. 29-30, 38-39) that *Little Rock Packing* cannot be read as a mere application of Section 7(f) because the reported facts reveal no fluctuation in the regular time hours (hours below 40) worked by the employees, as required by the "irregular hours" language in Section 7(f). But the court in *Little Rock Packing* expressly relied on Section 7(f). See 202 F.2d at 238 & n.1. We note in addition that the Secretary apparently did not challenge the applicability of the exemption in the absence of a showing of "irregular hours."

evidence that *Little Rock Packing* is not authority for the position urged by petitioners. But even if it were, the fact that no appellate court has adopted that view since 1953 indicates that any conflict that may exist between the decision below and *Little Rock Packing* is not of sufficient significance to warrant this Court's attention.

Indeed, a more recent decision of the Eighth Circuit, *Marshall* v. *Hamburg Shirt Corp., supra*, indicates that that court currently is in full agreement with the other courts of appeals that have held that the sole exception from the duty of computing overtime compensation under Section 7(a) is pursuant to a plan that meets all of the requirements of the Section 7(f) exemption, including the requirement of fluctuating *non*overtime hours. In *Hamburg Shirt*, the court of appeals rejected a guaranteed overtime contract on the ground that it did not require irregular hours of work, "even though the employee works a varying number of overtime hours" (577 F.2d at 446).[9]

Moreover, the Secretary of Labor has consistently interpreted Section 7(f) to be the only provision of the Act that permits an employer to pay the same weekly compensation to an employee who works overtime and whose hours of work vary from week to week (see 29 C.F.R. 778.403) and has consistently construed the irregular hours provision of

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[9]Petitioners' attempt to distinguish *Hamburg Shirt* on the grounds (Pet. 32-33) that the contract involved in that case "did not establish a fixed 'regular rate' from which overtime compensation due could be computed, and did not in fact properly compensate overtime hours" is unavailing. The court's reliance on the absence of a fixed regular rate clearly was an alternative basis for its rejection of the contract at issue (577 F.2d at 447 (emphasis added)):

> *First*, the duties of these employees do not *necessitate* irregular hours of work. *Second*, the guaranteed plan is intended to include overtime compensation but does not compensate hours in excess of 40 at one and one-half times a specified regular rate.

Section 7(f) as requiring fluctuation in the employee's nonovertime as well as overtime hours (see 29 C.F.R. 778.406). Furthermore, where guaranteed pay plans fail to meet the requirements of Section 7(f), all compensation received under the plan is included in the employee's "regular rate" of pay (29 C.F.R. 778.403).[10] These interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). The court of appeals correctly applied the Secretary's regulations in this case.

As the Secretary's regulations (29 C.F.R. 778.406) explain, limitation of the availability of *Belo* contracts to employers whose businesses require irregular nonovertime

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[10]Contrary to petitioners' assertion, this approach, adopted by the courts below to compute petitioners' employees' "regular rate" of pay, does not conflict with the decision of any other court of appeals. The district court (Pet. App. B22-B23), affirmed by the court of appeals, employed the formula for computing overtime for employees under a fixed weekly wage established by this Court in *Overnight Motor Transportation Co.* v. *Missel*, 316 U.S. 572, 580 n.16 (1942): "Wage divided by hours equals regular rate. Time and a half regular rate for hours employed beyond statutory maximum equals compensation for overtime hours." The courts of appeals have uniformly followed this approach for computing overtime pay due where, as here, employees receive a fixed salary for workweeks involving varying overtime hours. See, *e.g.*, *Marshall* v. *Hamburg Shirt Corp.*, 577 F.2d at 447; *Triple "AAA" Co.* v. *Wirtz*, 378 F.2d 884, 887 (10th Cir. 1967).

The cases relied on by petitioners (Pet. 34-35) are not to the contrary. In *Marshall* v. *Chala Enterprises, Inc.*, 645 F.2d 799, 801 (1981), the Ninth Circuit did not even "reach the issue whether the district court erroneously accepted [the employer's] computation of an hourly rate, arrived at after the fact by dividing the monthly salary into a regular hourly wage and a stepped-up overtime rate" (footnote omitted). Rather, in the circumstances of that case, the court of appeals expressly approved (*ibid.*) use of the same formula employed by the Secretary and the courts below in this case — "when a weekly salary is paid, the employer is deemed to have paid the same rate for all hours worked, rather than the requisite overtime compensation." In any event, *Chala*

hours is entirely consistent both with this Court's decisions and with the purposes underlying the FLSA. The Court has acknowledged that the overtime provision of the Act was intended to serve two fundamental purposes: (1) to "spread employment" and shorten hours by making it more expensive for employers to pay employees for overtime than to distribute the work among a larger number of employees; and (2) to compensate employees for the burden of working long hours. *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, 40 (1944); *Overnight Motor Transportation Co.* v. *Missel*, 316 U.S. at 577-578. The court of appeals correctly concluded that petitioners' pay plan is inconsistent with

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Enterprises is distinguishable from the present case because the employees in *Chala* apparently worked a fixed, 60-hour week, rather than varying amounts of overtime. See *id.* at 800. In *Brennan* v. *Valley Towing Co.*, 515 F.2d 100, 103 (9th Cir. 1975), the court also approved of the approach adopted below: "[T]he district court should have determined the 'regular rate' of pay by dividing the total weekly compensation paid to each employee by the actual hours worked. The district court should then have awarded such employee an amount representing half of that regular rate for each overtime hour worked in the relevant period." In *Wirtz* v. *Leon's Auto Parts Co.*, 406 F.2d 1250 (5th Cir. 1969), as well, the court of appeals upheld the Secretary's determination.

The remaining cases cited by petitioners (Pet. 35-36) are inapposite. *Marshall* v. *Hendersonville Bowling Center*, 483 F. Supp. 510 (M.D. Tenn. 1980), aff'd, 672 F.2d 917 (6th Cir. 1981) (table), did not involve guaranteed pay for fluctuating overtime hours; the parties in that case had contracted for 47 ½ hours of work per week at a specified salary. 483 F. Supp. at 515. The other cases relied on by petitioners are distinguishable in that they satisfied Section 7(f)'s requirement of irregular hours of nonovertime work. See *Mitchell* v. *Adams*, 230 F.2d 527, 529 n.4 (5th Cir. 1956); *McComb* v. *Pacific & Atlantic Shippers Ass'n*, 8 Wage & Hour Cas. 43, 44 (N.D. Ill. 1948), aff'd, 175 F.2d 411 (7th Cir. 1949); *Boll* v. *Federal Reserve Bank*, 21 Wage & Hour Cas. 876, 881 (E.D. Mo. 1973); cf. *Beechwood Lumber Co.* v. *Tobin*, 199 F.2d 878 (5th Cir. 1952) (no exemption from overtime provision where irregular hours are not required by employer's business). But see *Wirtz* v. *Empire Lumber Co.*, 19 Wage & Hour Cas. 103 (S.D. Ga. 1969).

these salutary legislative goals. As the court held (Pet. App. A11), the pay plan at issue here conflicts with the legislative purpose of spreading available work among a greater number of employees by making overtime more expensive, because the employer has agreed to pay the contracting employee for four hours of overtime regardless of whether he works those hours. The plan likewise is inconsistent with the congressional intention to provide a compensatory premium for the employee who must work overtime. Under its terms, rather than receiving an additional one and one-half times the actual regular rate of pay for each hour worked in excess of 40, the employee receives no additional pay until the hours worked exceed the "guaranteed" number.

This case well illustrates that if the fluctuation in the workweek hours need occur only in overtime hours (as petitioners contend), an employer could utilize *Belo* contracts for virtually all employees and thereby avoid the financial deterrent to the use of overtime hours that Section 7 was designed to impose. Moreover, so long as the fluctuation occurs only in overtime hours, the employees are afforded stability of income and employment; the factors that led this Court to uphold the contract at issue in *Belo* therefore do not require—or warrant—the same result in these circumstances. See 29 C.F.R. 778.406.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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